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ATTORNEY FOR APPELLANTS:

**W. WILLIAM HODES, ESQ.**  
The William Hodes Professional Corporation  
Indianapolis, Indiana

ATTORNEYS FOR APPELLEES:

**EDWARD L. MURPHY, JR.**  
**MICHAEL A. BARRANDA**  
Miller Murphy, LLP  
Fort Wayne, Indiana

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**IN THE  
COURT OF APPEALS OF INDIANA**

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MAVERICK MUSSER, by his next friends; )  
MISCHELLE MUSSER; and MICHAEL )  
MUSSER, )

Appellants-Plaintiffs, )

vs. )

DANIEL A. ROBY; DAVID J. STACH; and )  
ROBY & HOOD LAW FIRM, )

Appellees-Defendants. )

No. 02A03-0703-CV-98

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APPEAL FROM THE ALLEN SUPERIOR COURT  
The Honorable David J. Avery, Judge  
Cause No. 02D01-0406-PL-304

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**December 13, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**FRIEDLANDER, Judge**

Maverick Musser, by his parents and next friends, Mischelle and Michael Musser (the Mussers), filed a legal malpractice action against Daniel A. Roby, David J. Stach, and Roby & Hood Law Firm (collectively referred to as the Law Firm). The Mussers based their claim, in relevant part, upon the Law Firm's failure to properly disclose expert medical witnesses in a federal malpractice suit, which resulted in the exclusion of said expert testimony and the grant of summary judgment against the Mussers. In the instant legal malpractice action, the trial court granted summary judgment in favor of the Law Firm on the basis of proximate cause. On appeal, the Mussers present the following restated and consolidated issue for review: Did the trial court properly enter summary judgment in favor of the Law Firm?

We affirm.<sup>1</sup>

Maverick was born prematurely on January 10, 1998, at a gestational age of approximately twenty-two weeks.<sup>2</sup> As a result of his premature birth, Maverick spent his entire life either hospitalized or under twenty-four-hour nursing care at his home. Beginning in April 1999, Dr. William Smits was Maverick's treating physician. At that

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<sup>1</sup> We held oral argument in this case in Indianapolis on October 1, 2007.

<sup>2</sup> The facts are gleaned from the chronological case summary and the various orders included in the Appellants' Appendix. We observe, however, that the parties have not provided this court with the summary judgment materials, including the motions, supporting memoranda, or all of the designated evidence. While we prefer to decide cases on the merits, we have frequently affirmed or dismissed an appeal based upon the appellant's failure to provide us with the necessary summary judgment material. *See, e.g., Yoquelet v. Marshall County*, 811 N.E.2d 826 (Ind. Ct. App. 2004); *Hughes v. King*, 808 N.E.2d 146 (Ind. Ct. App. 2004). The parties in this case appear to agree, however, that we can decide this case based upon the handful of documents provided in the Appellants' Appendix, which we assume were designated to the trial court. Therefore, while hampered in our review, we will proceed with addressing the merits of the appeal. *See City of Fort Wayne v. Pierce Mfg., Inc.*, 853 N.E.2d 508 (Ind. Ct. App. 2006), *trans. denied*.

time, Maverick already had a tracheotomy, which had been performed due to his severe bronchopulmonary dysplasia (BPD) and ventilator dependency. Maverick's frequent hospitalization included a July 26 to August 4, 1999 stay at St. Vincent's Hospital in Indianapolis, where Dr. Harvey Bieler, a pediatric Pulmonologist, treated him. Thereafter, Maverick died at his home on the evening of August 18, 1999, while under the care of Dawn Kinzer, a nurse employed by Gentiva Health Services (Gentiva).

After Maverick's death, the Mussers hired the Law Firm to pursue an action against Gentiva and Apria Healthcare (Apria), which provided several life-sustaining medical devices and monitors used to care for the infant. On February 20, 2001, the Mussers filed suit against Gentiva and Apria in the United States District Court for the Northern District of Indiana (the district court), properly invoking diversity jurisdiction. In their complaint, the Mussers alleged that the monitors supplied by Apria were not properly set or properly functioning and that Gentiva's employees were negligent in their care of Maverick.

While the case was pending before the district court for well over a year, the Mussers disclosed several potential witnesses and depositions were taken by the defendants. The Mussers' deadline for expert disclosures expired on June 1, 2002, without them identifying any witnesses as experts or filing expert reports pursuant to Rule 26(a)(2) of the Federal Rules of Civil Procedure.

With trial on the horizon and no expert disclosures, Apria and Gentiva filed motions for summary judgment on August 1 and October 15, 2002, respectively.<sup>3</sup> In support of their motions, the defendants argued the Mussers had provided no expert medical testimony and, therefore, could not show a breach of duty or injury proximately caused by the breach of that duty.<sup>4</sup> Because it is the only matter relevant to the instant legal malpractice case, we will hereafter focus on the proceedings regarding Gentiva's motion. We note, however, that summary judgment was also granted in favor of Apria.

The Mussers responded to Gentiva's motion on November 19, 2002. Specifically, they referred the district court to the deposition testimony of three nurses, Dr. Smits, and Dr. Bieler to support their claim that a genuine issue of material fact existed as to whether nurse Kinzer breached her duty of care through inattention to Maverick prior to his death and incompetence in attempting to revive him. Countering the Mussers' response, on December 3, 2002, Gentiva filed a motion to strike any expert testimony from these witnesses. In its motion Gentiva indicated that the Mussers had not identified as medical experts any of the witnesses previously deposed.

In response to the motion to strike, the Mussers claimed that any failure to comply with the disclosure requirements regarding expert witnesses was both justified and

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<sup>3</sup> It appears the trial was originally scheduled to commence in late November 2002 and then rescheduled for March 24, 2003, likely as a result of the summary judgment motions.

<sup>4</sup> In Indiana, a plaintiff in a medical malpractice case must generally present expert testimony to establish the applicable standard of care and to show a breach of that standard. *See Narducci v. Tedrow*, 736 N.E.2d 1288 (Ind. Ct. App. 2000).

harmless. In its January 8, 2003 order, the district court explained the Mussers' argument as follows:

The Mussers point out that although the doctors and nurses they are now relying on for expert testimony were not disclosed as expert witnesses, Gentiva clearly knew the identities of the witnesses well before the deadline for disclosure of expert witnesses. The Mussers contend that their failure to comply with the disclosure requirements of Rule 26(a)(2)(A) was justified because the witnesses had already given their testimony during discovery depositions. The Mussers argue that the actual taking of the depositions surpassed the requirements of Rule 26(a)(2)(A), or at the very least that it was reasonable for the Mussers to believe that Gentiva's possession of the medical records and taking of depositions satisfied the requirement for the Mussers to disclose expert witnesses. The Mussers further claim that allowing the expert testimony of the witnesses results in absolutely no prejudice to Gentiva, and thus any failure to comply with Rule 26 should be seen as harmless.

*Appellants' Appendix* at 52. The district court rejected the Mussers' arguments, finding that Gentiva had clearly suffered harm by being deprived of the opportunity to depose the witnesses as experts and that the Mussers had shown no justification for their failure to designate expert witnesses. Thus, the court concluded, "*the doctors and nurses identified by the Mussers* should not be permitted to testify as expert witnesses." *Id.* at 53 (emphasis supplied).

"[O]ut of an abundance of caution," the district court then briefly addressed the testimony and competency of the proposed expert witnesses. *Id.* The court found that the nurses were not competent to testify as to the ultimate issue of causation of death. With respect to the deposition testimony of Dr. Smits and Dr. Bieler, the court indicated that neither doctor had expressed an opinion as to Maverick's cause of death. The court then stated:

In fact, when all the proposed testimony is carefully examined, it is clear that *none* of the proposed expert witnesses have an opinion as to the proximate cause of Maverick's death. Although the witnesses have testified that Maverick died because he decannulated and went into respiratory arrest and then cardiac arrest, there is no testimony that identifies anyone as being responsible for these events. Rather, the Mussers have based their case against Gentiva on the assumption that because a healthcare nurse was in their home, but yet Maverick died, that the nurse must have somehow been responsible for his death. However, there is no evidence to support this assumption. As noted earlier in this order, the Mussers themselves have acknowledged that Maverick's respiratory arrest could have been the result of a BPD spell, decannulation, or some other event. Although the Mussers cling to their belief that something could have been done in time to save their son under any possible scenario, there is simply no evidence to support their belief. This is clearly a case where "[i]t is gratuitous cruelty to parties and their witnesses to put them through the emotional ordeal of a trial when the outcome is foreordained." *Mason v. Continental Illinois Nat's Bank*, 704 F.2d 361, 367 (7<sup>th</sup> Cir. 1983).

Accordingly, for all of the reasons discussed above, Gentiva's motion to strike expert testimony will be granted. Additionally, as the Mussers acknowledge that their case fails without expert testimony<sup>[5]</sup>, summary judgment will be granted in favor of Gentiva.

*Appellants' Appendix* at 55 (emphasis in original).

The Law Firm appealed the district court's ruling to the United States Court of Appeals, Seventh Circuit. On January 28, 2004, the Seventh Circuit affirmed the grant of summary judgment against the Mussers and held: "Because the expert medical testimony proffered by the Mussers in response to the motion for summary judgment was properly

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<sup>5</sup> Footnote 13 of the district court's order reads: "In their response to Gentiva's motion to strike the Musser's [sic] acknowledge that 'excluding the testimony of *these witnesses* would then require the granting of Gentiva's Motion for Summary Judgment.' (Response Brief at 10)." *Appellants' Appendix* at 55 (emphasis supplied).

excluded as a sanction under Federal Rule of Civil Procedure 37(c)(1),<sup>[6]</sup> and because under Indiana law a prima facie case in medical malpractice cannot be established without expert medical testimony, we affirm.” *Musser v. Gentiva Health Servs.*, 356 F.3d 751, 753 (7<sup>th</sup> Cir. 2004).

On June 28, 2004, the Mussers filed the instant legal malpractice action in the Allen County Superior Court against the Law Firm. Specifically, they alleged that the Law Firm had breached the legal duty owed to them as follows: 1) The Law Firm failed to file their expert disclosures as ordered by the district court; 2) the Law Firm failed to obtain expert witnesses necessary to testify as to the standard of care; and 3) the Law Firm failed to properly prepare the expert witnesses they did obtain and identify. About two years later, the Law Firm filed a motion for summary judgment contending, among other things, that the Mussers could not meet their burden as to proximate cause and damages with respect to the first allegation in the complaint. In this regard, the Law Firm argued:

[I]t is entitled to summary judgment on the issue of whether the Law Firm’s failure to designate Dr. Smits, Dr. Bieler, and three nurses as expert witnesses in violation of FRCP 26(a)(2)(A) proximately caused injury to the Mussers. The Law Firm argues that even if Dr. Smits, Dr. Bieler and three nurses had been designated as expert witnesses, the testimony of these individuals fail to establish that the negligence of the home health care nurse as the proximate cause of Maverick Musser’s death. Consequently,

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<sup>6</sup> The court explained that this was not a case where the disclosure was late by a trivial amount of time or where ample time remained for further discovery. In fact, in a case where expert testimony was crucial to their claim, the court noted the Mussers never attempted to disclose a single expert witness until the defendants moved for summary judgment. Further, by the time the district court ruled on the summary judgment motions on January 8, 2003, there was less than three months remaining before trial (and there had already been a four-month delay from the original trial date).

the failure to designate these individuals as expert witnesses did not result in any injury to the Mussers.

*Appellants' Appendix* at 31.

In response, the Mussers designated the expert testimony of Dr. Mark Farber, who opined that the delay of re-inserting the trach tube in a timely manner was the proximate cause of Maverick's death. In light of the contrary opinions offered by the Law Firm's expert witnesses, the trial court concluded in its August 21, 2006 order that a genuine issue of material fact existed at this time regarding the proximate cause of the infant's death. Despite this finding, the trial court granted the Law Firm's motion for summary judgment in part on the following grounds:

[T]he Mussers have failed to offer designated evidentiary material that Dr. Smits or Dr. Bieler had an opinion as to what caused Maverick Musser's respiratory failure, and his subsequent death. Without such an opinion by one of the two physicians, the Mussers are unable to demonstrate that the Law Firm's failure to designate Dr. Smits and Dr. Bieler as experts pursuant to FRCP 26(a)(2)(A) proximately caused an injury to the Mussers. If neither Dr. Smits nor Dr. Bieler had an opinion on the cause of Maverick Musser's death, there was no harm to the Mussers as a result of the Law Firm's failure to designate them as experts in violation of FRCP(a)(2)(A). Mussers had the burden to offer the evidence that demonstrated the existence of a genuine issue of material fact on this issue. They have not met that burden.

As to the three nurses that the Law Firm failed to list as expert witnesses, none of them would have been permitted to give an opinion on the cause of death because nurses are not qualified to render expert testimony on a medical issue such as cause of death. *Syryczek v. Methodist Hospital, Inc.*, 694 N.E.2d 1186, 1189 (Ind. Ct. App. [1998]).

Nor is there any designated evidentiary material offered that demonstrates that the Law Firm or the Mussers had identified any other expert that could have given a favorable opinion as to the cause of death prior to the expiration of the deadline to disclose expert witnesses pursuant to FRCP(a)(2)(A).



Accordingly, the Court determines that the Law Firm's failure [to] designate Dr. Smits, Dr. Bieler and the three nurses as experts in violation of FRCP(a)(2)(A) did not result in an injury to the Mussers.

*Appellants' Appendix* at 32.

Following the grant of partial summary judgment in favor of the Law Firm, a *Daubert* motion filed by the Law Firm was granted to exclude the expert testimony of Dr. Farber. In a subsequent motion, the trial court also granted the Law Firm's motion to exclude the testimony of the Mussers' legal expert with respect to the remaining legal malpractice claims. Thereafter, the Mussers conceded that the Law Firm was entitled to summary judgment on the two remaining claims of legal malpractice (that is, as to their claim that the Law Firm failed to obtain expert witnesses necessary to testify as to the standard of care and their claim that the Law Firm failed to properly prepare the expert witnesses obtained and identified). In light of said concession, on February 2, 2007, the trial court entered summary judgment in favor of the Law Firm on the remaining claims and, thus, entered final judgment in favor of the Law Firm on all claims raised in the Mussers' complaint. The Mussers now appeal the grant of summary judgment entered with respect to their claim that the Law Firm committed malpractice by failing to file expert disclosures in the federal case.

On appeal from the grant of a motion for summary judgment, we apply the same standard applicable in the trial court. Summary judgment is appropriate only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C).

A defendant is entitled to judgment as a matter of law when the undisputed material facts negate at least one element of the plaintiff's claim. Under Indiana law, the elements of legal malpractice are: (1) employment of an attorney, which creates a duty to the client; (2) failure of the attorney to exercise ordinary skill and knowledge (breach of the duty); and (3) that such negligence was the proximate cause of (4) damage to the plaintiff. "Proximate cause requires that there be a reasonable connection between the defendant's allegedly negligent conduct and the plaintiff's damages. Proximate cause requires, at a minimum, that the harm would not have occurred but for the defendant's conduct." *Gates v. Riley ex rel. Riley*, 723 N.E.2d 946, 950 (Ind. Ct. App. 2000) (citations omitted), *trans. denied*.

*Clary v. Lite Machines Corp.*, 850 N.E.2d 423, 430 (Ind. Ct. App. 2006) (some citations omitted). In the legal malpractice action, then, it was the Mussers' ultimate burden to prove, among other things, that but for the Law Firm's failure to properly designate expert witnesses in the federal case, the Mussers would have, at a minimum, avoided summary judgment. *See Clary v. Lite Machines Corp.*, 850 N.E.2d 423.

It is undisputed the Mussers have failed to designate any evidence that the doctors excluded as expert witnesses in the federal case (Dr. Smits and Dr. Bieler) had an opinion, now or at the time of the medical malpractice case, as to the cause of Maverick's death. Rather, the Mussers rely exclusively on opinion testimony regarding cause of death that was garnered during the legal malpractice case from newly retained experts and apparently unknown during the medical malpractice case. While this evidence may well have been relevant to one or both of their abandoned claims of medical malpractice, it is not relevant to their remaining claim that the Law Firm failed to follow the federal rules regarding the designation of expert witnesses.

The Mussers attempt to analogize this case to one in which the attorney malpractice involves failure to timely file a complaint. This argument ignores the

advanced procedural stage at which the underlying case was lost, as well as the specific basis of legal malpractice asserted. As set forth above, Gentiva filed for summary judgment in the federal proceedings well after the Mussers' deadline for expert disclosures had passed and with the trial date quickly approaching. Indeed, the Seventh Circuit indicated that this was a case where little time remained for further discovery. In response to Gentiva's motion for summary judgment, the Mussers designated the deposition testimony of Dr. Smits and Dr. Bieler (as well as certain nurses) and urged that said evidence be considered despite the failure to properly designate the witnesses as experts. Contrary to the Mussers' assertion on appeal, the practical effect of the district court's discovery sanction was to exclude the expert testimony of these specific witnesses, and it was the exclusion of the proposed expert testimony of Dr. Smits and Dr. Bieler that led to the grant of summary judgment in favor of Gentiva. *See Musser v. Gentiva Health Servs.*, 356 F.3d at 753 (affirming grant of summary judgment "[b]ecause the expert medical testimony proffered by the Mussers in response to the motion for summary judgment was properly excluded...and because under Indiana law a prima facie case in medical malpractice cannot be established without expert medical testimony"). As the Mussers failed to designate any favorable expert opinions from Dr. Smits or Dr. Bieler regarding Maverick's cause of death (which could have avoided summary judgment in the underlying medical malpractice case), the trial court properly granted summary judgment in favor of the Law Firm in the instant legal malpractice case.<sup>7</sup>

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<sup>7</sup> Additionally, we note the alternative analysis of the district court disposing of the case on summary judgment even if all of the proposed expert testimony was considered. While this analysis is not

Judgment affirmed.

BAKER, C.J., and CRONE, J., concur.

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dispositive in the instant case, it is relevant to the issue of whether the Law Firm's breach of duty proximately caused damage to the Mussers. *See Clary v. Lite Machines Corp.*, 850 N.E.2d 423 (trial court's findings of fact, conclusions, judgment, and order in underlying action were relevant to the issue of proximate cause in the subsequent legal malpractice action). The Mussers assert on appeal that if the Law Firm had properly designated Dr. Smits and Dr. Bieler as experts under the federal rules, "*the depositions and the transcripts (to say nothing of the Expert Reports) would have produced an entirely different record*". *Appellants' Reply Brief* at 6 (emphasis in original). This may be true, but the Mussers have failed to designate any evidence to support their assertion in this regard.